90-1459

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO_____

CURTIS L. WRENN
P. O. Box 203
Fort Drum, NY 13603.

Petitioner.

vs /

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS AND CLARK C. GRANINGER, DIRECTOR, VETERANS ADMINISTRATION MEDICAL CENTER,

Respondents.

SUPPLEMENTAL

PETITIONER'S APPENDIXES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Court of Appeals
for the
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Third day of January, on thousand nine hundred and ninety-one.

CURTIS L. WRENN,

Plaintiff-Appellant,

-v-

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS AND CLARK C. GRANINGER, DIRECTOR, VETERANS ADMINISTRATION MEDICAL CENTER,

Defendants-Appellees.

Docket Number 90-6089

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by CURTIS L. WRENN, Pro Se.

Upon consideration by the panel that decided

the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ELAINE B. GOLDSMITH
Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CURTIS L. WRENN,

Plaintiff,

-v-

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS and CLARK C. GRANIGER, Director of the Veterans Administration Medical Center,

89-CV-374

Defendants.

APPEARANCES: OF COUNSEL:

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NEAL P. McCURN, C.J.

MEMORANDUM-DECISION AND ORDER

Plaintiff Curtis L. Wrenn ("Wrenn") has

sued the Secretary of the Department of Veterans Affairs and Clark C. Graniger, Director of the Veterans Administration Medical Center, alleging that the defendants have discriminated against Wrenn on the basis of plaintiff's age and/or race. The defendants bring this motion, seeking dismissal of plaintiff's complaint, or, in the alternative, summary judgment. For the reasons stated below, defendant's motion for summary judgment is granted.

Background

Curtis Wrenn applied for the position of temporary clerk-typist with the Veterans Administration Medical Center ("V.A.M.C.") on or about May 12, 1986. He alleges that he was denied this position because of his race and/or age. As a result of this denial, the plaintiff filed a complaint against the Veterans Administration ("V.A.") with the Equal Employment Opportunity Commission ("E.E.O.C." or "Commission") on March 21, 1987.

On July 18, 1988, the V.A., in an attempt

to settle this dispute, offered Wrenn what the E.E.O.C. terms "full relief" concerning Wrenn's complaint. The director offered Wrenn the following relief:

> a. Clerk-Typist GS-322-4 Temporary Appointment;
> b. Full relief under the Back Pay Act; and
> c. Any seniority that [Wrenn] may have earned.[1]

Two days later, Mr. Wrenn responded to this offer by stating:

> 1. Immediate hire in a position in Hospital and Health Care Administration and/or Personnel Management, in grade GS-9 or higher.
>
> 2. Full relief for the willful denial of equal employment opportunity, in violation of the Age Discrimination in Employment Act.
>
> 3. Seniority from at least May 22, 1984 on the basis of federal employment and combat services in South Vietnam.

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[1] This settlement offer by the V.A. was officially certified as an offer of full relief on August 10, 1988, by Gerald K. Hinch, General Counsel, Office of Equal Opportunity.

(emphasis in original).

The V.A. and the E.E.O.C. have both determined that this counter-offer includes terms unrelated to Wrenn's complaint. For example, the V.A.M.C. was seeking a temporary clerk-typist position, GS-322-4; yet plaintiff's counter-offer was for a position in Health Care Administration or Hospital Management, in a grade GS-9 or higher. Additionally, plaintiff's counter-offer sought seniority relating to plaintiff's combat services in Vietnam, however such service would clearly be irrelevant in computing any seniority Wrenn would have been entitled to concerning the clerk-typist position for which Wrenn had applied.

As a result of Wrenn's rejection of the offer of full relief, the E.E.O.C., pursuant to 29 C.F.R. Subsection 1613.215, cancelled the discrimination claim Wrenn had filed with the Commission. This section states, in pertinent part:

> (a) The agency head or designee shall reject or cancel a complaint:
> ***
> (7) If the complainant

> refuses within 15 calendar days of receipt of an offer of settlement to accept an agency offer of full relief in adjustment of the complaint, provided that the agency's Director of Equal Employment Opportunity...has certified in writing that the agency's written offer of relief constitutes full relief...

29 C.F.R. subsection 1613.215(a)(7).

Wrenn did not appeal this cancelation, as he could have pursuant to 29 C.F.R. subsection 1613.231(a)(1). However, subsequent to the filing of this judicial complaint, the plaintiff filed a request to reopen the previous E.E.O.C. decision, pursuant to 29 C.F.R. subsection 1613.235(b). On July 12, 1989, the E.E.O.C. declined this request, stating:

> [I]n the present case, the record indicates that appellant filed a civil action on april 3, 1989, concerning the agency's alleged discriminatory failure to select him for the temporary position of clerk-typist, GS-4. Therefore, the Commission finds that neither the agency nor the Commission has

> jurisdiction to decide the matter included in the civil action. Concomitantly, the issue of the propriety of the agency's cancellation of this matter is no longer a determinable issue since the matter is not amendable to further administrative processing due to lack of jurisdiction.

The defendants moved to dismiss plaintiff's claim on the grounds that this court does not have subject matter jurisdiction over Wrenn's complaint. They also move, in the alternative, for summary judgment on plaintiff's complaint.

Wrenn opposes said motion, and at oral argument on October 10, 1989, plaintiff argued that, upon not being hired by the V.A.M.C., he was entitled to an award of a sum of money equal to the backpay he would have received from the date he would have been appointed to the position absent discrimination, until the date the defendants offered Wrenn the position, pursuant to 29 C.F.R. subsection 1613.271 (b)(1).

Discussion

Wrenn's claim for relief is based upon 42

U.S.C. subsection 2000e-16(c), and 29 U.S.C. subsection 621 et seq. These statutes require plaintiffs who allege discrimination in employment to exhaust administrative remedies before filing an action with a district court.

Thus, in Rivera v. United States Postal Office 830 F.2d 1037 (9th Cir. 1987), cert. denied __ U.S. __, 108 S.Ct. 1737 (1988), reh'g denied __ U.S. _, 108 S.Ct. 2888 (1988), the court held that the plaintiff's failure to exhaust administrative remedies required dismissal of his age discrimination claims. Id. at 1039. Similarly, in Sims v. Heckler 725 F.2d 1143 (7th Cir. 1984), the Seventh Circuit affirmed the district court's dismissal of plaintiff's employment discrimination claim for lack of subject matter jurisdiction, due to plaintiff's failure to exhaust administrative remedies. Id. at 1146 (citations omitted).

The defendants argue that since the plaintiff commenced this civil action before the E.E.O.C. had declined to reopen Wrenn's E.E.O.C.

complaint, this district court does not have jurisdiction over plaintiff's claim, since it was filed before Wrenn exhausted his administrative remedies. This contention is unpersuasive.

In this case, Wrenn filed the instant lawsuit on April 3, 1989, several months before the E.E.O.C. declined to reopen his case on July 12, 1989. While it is true that, at the time the lawsuit was filed, Wrenn's administrative remedies were not exhausted, it is equally true that, at the present time, Wrenn has, in fact, exhausted his administrative remedies. Indeed, the reason the Commission provided for not reopening Wrenn's E.E.O.C. complaint was because it found that this court, and not the Commission, had jurisdiction over Wrenn's complaint.

The defendants alternatively claim that the plaintiff failed to exhaust his administrative remedies because his complaint was properly stricken by the E.E.O.C. pursuant to 29 C.F.R. subsection 1613.215 (a)(7). This argument, too, is unsound.

While the plaintiff could have appealed the agency's decision to cancel his complaint, pursuant to 29 C.F.R. subsection 1613.231 (a)(1), this appeal was not required. This is demonstrated by the fact that when the Commission notified Wrenn of the E.E.O.C.'s decision to cancel Wrenn's complaint, the Commission informed Wrenn that he could file a suit in district court, based upon the defendants' alleged discriminatory conduct.[2]

To hold today that this court does not have jurisdiction over Wrenn's complaint would arguably leave the plaintiff without any remedy, since the E.E.O.C. has declined to entertain jurisdiction over Wrenn's claim based on the theory that the district court has jurisdiction over Wrenn's complaint. Therefore, this court holds that it does have subject matter jurisdiction over plaintiff's complaint, and accordingly denies defendant's motion

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[2] 29 C.F.R. subsection 1613.215 (b) states that following the cancelation of a complaint by the E.E.O.C., a civil action may be filed in a United States district court pursuant to 29 C.F.R. subsection 1613.281.

to dismiss Wrenn's complaint.

Since this court has jurisdiction over plaintiff's complaint, it must determine whether the defendants are entitled to summary judgment on plaintiff's claim.

To briefly review the facts in this case, the defendant V.A.M.C. hired an individual other than Wrenn even though the plaintiff had applied and was qualified for this very position. Believing that he had been discriminated against on the basis of his race and/or age, the plaintiff filed a complaint with the E.E.O.C. In an attempt to settle this dispute, the V.A. offered the plaintiff what the Commission certified "full relief". This offer was rejected by Wrenn, and consequently the E.E.O.C. cancelled his administrative complaint pursuant to 29 C.F.R. subsection 1613.215. The defendants now seek dismissal of, or summary judgment on, Wrenn's civil complaint.

Wrenn argues that the defendant's motion should be denied for several reasons. He alleges

that (a) the offer by the defendants was not certified by the E.E.O.C. as "full relief"; (b) he was entitled to an award of a sum of money equal to the backpay he would have received from the date he would have been appointed to the position absent discrimination, until the date the defendants offered Wrenn the position; and (c) summary judgment would be inappropriate since he has not had a hearing with the E.E.O.C. None of these arguments are sound.

(a) The offer by the V.A. was certified "full relief".

Wrenn claims that the V.A.'s offer was not full relief because the offer was for a temporary position, and he claims that he had applied for a permanent job.

The advertisement in the Albany Times-Union for Clerk-Typists to which Wrenn responded states:

> **CLERK TYPIST**
> Immediate vacancies exist at the Albany VA Medical Center for 2 clerk typist positions.
>
> Applicants are required to type a minimum of 40 wpm.

Medical terminology preferred.

For further information contact:

V.A. Medical Center
113 Holland Ave., Albany
Personnel Office, Room 106B
(518) 462-3311, Ext 204

EOE

At the time the plaintiff submitted his application, Kara Jordan was the personnel assistant of the V.A.M.C. As its personnel assistant, Jordan was in charge of hiring persons for the aforesaid Clerk-Typist position. As Jordan's testimony indicates, all applicants who followed the instructions in the advertisement by calling the V.A.M.C. were notified that only temporary jobs were available for the Clerk-Typist position.[3]

Rather than call the V.A.M.C. before submitting his application, Wrenn chose to first submit his application which clearly indicated that

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[3] See Preliminary Affidavit of kara Jordan, 9/17/87, exhibit "E" in Defendants' Reply Memorandum.

he wanted a permanent position.[4] Thus, the fact that Wrenn thought that the clerk-typist job was a permanent position is irrelevant, because had the plaintiff called the V.A.M.C. as the advertisement directed, Wrenn would have discovered that the position he was applying for was only temporary.

Since the offer by the V.A. was certified as full relief by Gerald K. Hinch, General Counsel for the Office of Equal Opportunity on August 10, 1988, the plaintiff's contention that this offer was not properly certified as "full relief" is without merit.

(b) The plaintiff's demand for backpay.

Wrenn cites 29 C.F.R. subsection 1613.271 (b)(1) for the proposition that he was entitled to a sum equal to the backpay he would have received from the date he would have been appointed to the position of clerk-typist until the date he declined the V.A.'s offer of employment. This section

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[4] On his application, Wrenn noted that he would not be available for employment lasting less than twelve months.

provides, in pertinent part:

> (b) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position the applicant would have occupied absent discrimination or...a substantially equivalent position...If the offer of employment is declined, the agency shall award the individual a sum equal to the backpay he would have received...from the date he would have been appointed until the date the offer was made....(emphasis added)

In the instant case, neither the V.A. nor the E.E.O.C. found that the V.A.M.C. had discriminated against Wrenn. Rather, in an attempt to resolve this dispute, the V.A. made Wrenn an offer of full relief, which would have placed Wrenn in exactly the same position he would have been in had he been offered the Clerk-Typist position in the first instance.

Certainly, the V.A.'s attempt to settle this dispute did not constitute an admission of discrimination on the defendant's part.

Since there has been no finding, by either the V.A. or the E.E.O.C., that the plaintiff has

been discriminated against, 29 C.F.R. subsection 1613.271 (b)(1) is inapplicable, and the defendants were not required to offer Wrenn a sum of money equal to the backpay he would have received from the date he would have been appointed to the position of clerk-typist until the date he declined the V.A.'s offer of employment.

(c) Plaintiff can not obtain a hearing with the E.E.O.C.

In the Commissions' ruling which dismissed plaintiff's request to reopen his E.E.O.C. complaint, the Commission stated that the it no longer has jurisdiction over plaintiff's claim, pursuant to 29 C.F.R. subsection 1613.283. This section states:

> The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

Wrenn, by commencing a civil action against the defendants, stripped the E.E.O.C of jurisdiction over his complaint, and the Commission can therefore

not provide the plaintiff with a hearing pursuant to 29 C.F.R. subsection 1613.218.

Conclusion

The V.A. offered Wrenn all he was entitled to in its offer of full relief on July 18, 1988. Wrenn, in declining this offer, made a counter-offer which included terms wholly unrelated to the position he had applied for on May 12, 1986. Since the defendants have offered Wrenn all he was entitled to, this court grant's the defendants' motion for summary judgment.

IT IS SO ORDERED.

DATED: February 13, 1990
Syracuse, NY

/s/Neal P. McCurn
Chief, U.S.
District Judge